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THE WHITE HOUSE

WASHINGTON

May 14, 1985

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Attached for your information are two articles that appear in this month's issue of Judicature. The articles are entitled "Reaganizing the judiciary: the first term appointments," and "The federal judiciary: what role politics?"

Reaganizing the judiciary: the first term appointments

The Reagan Administration is effectively reshaping the federal bench. The extent to which its appointees will reshape public policy remains to be seen.

by Sheldon Goldman

Ronald Reagan's reelection by a landslide victory in 1984 was hailed by some observers as a significant political event comparable to Franklin Roosevelt's reelection in 1936. Both presidents received overwhelming electoral approval, which was widely interpreted as a mandate to continue along the course set in the first term. Both were enormously popular with the large majority of the populace, although both stimulated considerable antipathy and even denigration from a vocal minority opposed to Administration philosophy and policy. Both elections could be seen as confirming a new electoral era in national politics and new voting patterns among young voters and other population groups.

In addition, both presidents had spent their first terms dealing with economic crises and both used Keynesian economics (without credit to Keynes in the latter instance) to nurse

the economy back to health. Both presidents had a view of the role of government, including the courts, that was radically different from their immediate predecessors in office. Indeed, both sought to change the direction of government, saw the courts as frustrating their policy agendas, and self-consciously attempted to use the power of judicial appointment to place on the bench judges sharing their general philosophy. And with both, their presidential campaigns saw the courts and judicial appointments emerge as issues.

Franklin Roosevelt left a major legacy with his court appointments that fundamentally reshaped constitutional law and whose judges numerically dominated the lower federal courts for close to a decade after his presidency. Ronald Reagan has already begun the groundwork for his judicial legacy. With just two terms in office as compared to Roosevelt's three plus, Reagan will accomplish what only Roosevelt and Eisenhower accomplished during the last half century—naming a majority of the lower federal judiciary in active service.[1] This makes it all the more significant to inquire what has been the Reagan first term record in the realm of judicial selection. What changes have occurred in the selection process? What is the professional, demographic, and attribute profile of the Reagan appointees and how do they compare with appointees of previous administrations? Has the Administration been successful in placing on the bench those in harmony with Administration philosophy? What can we expect in the second term? These are the questions that this article confronts.

The data on the backgrounds and selection of the judges come from a variety of sources including personal interviews, examination of the questionnaires that all judicial nominees complete for the Senate Judiciary Committee,[2] various biographical directories, state legislative handbooks, newspapers from the appointees' home states, published and unpublished confirmation hearings by the Senate Judiciary Committee, the yearly *Congressional Quarterly Almanac*, and two recently available sources: the second edition of *Judges of the United States*[3] and the inaugural volume of what promises to be an annual series,

Reagan will name a majority of the lower federal judiciary in active service.

The Federal Judiciary Almanac.[4]

The findings and analyses presented here concern all lifetime federal district and courts of appeals judges confirmed by the U.S. Senate of the 97th and 98th Congresses. The courts of appeals judges analyzed were only those appointed to the 11 numbered circuits and the Court of Appeals for the District of Columbia. Appointments to the Court of

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An earlier version of this analysis was presented in a public lecture at Wake Forest University. The author would like to thank his hosts for their generous hospitality.

1. The Administrative Office of U.S. Courts has calculated that Roosevelt appointed 81.4 per cent of the judiciary, Truman 46.5 per cent, Eisenhower 56.1 per cent, Kennedy 32.8 per cent, Johnson 37.9 per cent, Nixon 45.7 per cent, Ford 13.1 per cent, and Carter 40.2 per cent. During his first term, Reagan appointed 24.3 per cent of the judiciary. The Administrative Office estimates that by the end of the second term Reagan will have appointed a majority of the judiciary. At the start of the second term there were 99 vacancies to be filled. In addition there were 52 judges eligible to retire. Furthermore, some 81 judges will become eligible to retire during the course of the second term. Although all those eligible to retire do not do so, a large proportion can be expected to assume senior status. Unexpected vacancies caused by death or resignation will undoubtedly occur and this too will add to the numbers and proportion of judges appointed. Administrative Office figures are cited in Ciolli, *Reagan Set for Judicial Record*, NEWSDAY, December 9, 1984, at 6.

2. The author would like to thank Mark H. Gitenstein, Chip Reid, Christine Phillips, and other staff of the minority office, Senate Judiciary Committee, for their cooperation and assistance.

3. (Washington, D.C.: Government Printing Office, 1983).

4. Dornette and Cross, FEDERAL JUDICIARY ALMANAC 1984 (New York: Wiley, 1984).

Appeals for the Federal Circuit, a court of specialized as opposed to general jurisdiction, were not included. The findings for the Reagan first term appointments[5] are compared to those for the Johnson, Nixon, Ford, and Carter lifetime appointments to courts of general jurisdiction. During his first term Reagan named 129 to the district courts and 31 to the appeals courts.

Selection under Reagan

A striking characteristic of the judicial selection process in the Reagan Administration has been the formalization of the process by institutionalizing interaction patterns and job tasks that in previous administrations were more informal and fluid. There have also been changes of more substantive import.

The center of judicial selection activity in previous administrations was the Deputy Attorney General's Office, with an assistant to the deputy responsible for the details, and at times negotiations, associated with the selection process.[6] During the Reagan Administration these responsibilities have shifted to the Office of Legal Policy. The Assistant Attorney General heading that office reports to the Deputy Attorney General but also has an independent role as a member of the President's Federal Judicial Selection Committee. Assisting the head of the Legal Policy division in matters concerning judicial selection is the Special Counsel for Judicial Selection, a post formally established in September of 1984. The Attorney General, Deputy Attorney General, the Assistant Attorney General for Legal Policy, the Special Counsel for Judicial Selection, and some of their assistants meet to make specific recommendations for judgeships to the President's Committee on Federal Judicial Selection.

The major substantive innovation in the selection process made by the Reagan Administration is the creation of the President's Committee on Federal Judicial Selection. This nine-member committee institutionalizes and formalizes an active White House role in judicial selection. Members of the Committee from the White House during the first term included presidential counselor Edwin Meese III, White House chief of staff James A. Baker III, John S. Herrington, assistant to the President for personnel, M.B. Oglesby, assistant to the President for legislative affairs, and presidential counsel Fred Fielding, who serves as chair of the Committee. From the Justice Department are the Attorney General, Deputy Attorney General, Associate Attorney General, and the Assistant Attorney General for Legal Policy.

The highest levels of the White House staff have played a continuing active role in the selection of judges. Legislative, patronage, political, and policy considerations are considered to an extent never before so systematically taken into account. This has assured policy coordination between the White House and the Justice Department, as well as White House staff supervision of judicial appointments.

The Committee does not merely react to the Justice Department's recommendations; it is also a source of names of potential candidacies and a vehicle for the exchange of important and relevant information. Furthermore, the president's personnel office conducts an investigation of prospective nominees *independent of* the Justice Department's investigation.[7] It is perhaps not an overstatement to observe that the formal mechanism of the Committee has resulted in the most consistent ideological or policy-orientation screening of judicial candidates since the first term of Franklin Roosevelt.

It is also relevant to observe that this selection process innovation potentially contains an inherent source of tension as the perspective from the Justice Department can be quite different from that of the White House. The cooptation of judicial selection by the Rea-

5. Technically, Reagan's first term ended on January 20, 1985 after the 99th Congress already had been in session for several weeks. Therefore all nominations confirmed by the Senate up until then should be considered first term appointments. However, by January 20 no nominations had even been sent to the Senate of the 99th Congress, thus the analysis is confined to those confirmed during the 97th and 98th Congresses.

6. See, for example, the discussion and citations in Goldman and Jahnige, THE FEDERAL COURTS AS A POLITICAL SYSTEM, 3rd ed., 39-51 (New York: Harper & Row, 1985).

7. Interview with Jane Swift, Special Counsel for Judicial Selection, Office of Legal Policy, Department of Justice, December 18, 1984.

gan White House has now been completed with former presidential counsel Edwin Meese III now serving as Attorney General.

Although the consequences of this shift is immediately apparent in terms of the screening of candidates, in the hands of a less ideologically oriented administration partisan patronage considerations could conceivably become the principal selection criterion. Professional credentials would then be minimized, resulting in a lower quality federal bench. This is not meant to fault the Reagan Administration for its innovations in the selection process. Indeed, from the standpoint of achieving Administration goals, those innovations are rational and functional. But there may be unintended consequences from these changes that should be watched by those who are concerned with the administration of justice.

Another change in the process worthy of note is that the Reagan Administration is the first Republican Administration in 30 years in which the American Bar Association Standing Committee on Federal Judiciary was not actively utilized and consulted in the pre-nomination stage. From the Eisenhower Administration through the Ford Administration, Justice Department officials sounded out the ABA Standing Committee for tentative preliminary ratings of the leading candidates for a specific judgeship. These informal reports could be used by Justice officials in negotiations with senators and other officials of the president's party. At times they influenced the Justice officials' final selection. During the Carter Administration, however, this close working relationship ended as the Administration established its own judicial selection commission for appeals court appointments and most Democratic senators established analogous commissions for district court positions.

The Reagan Administration abolished the selection commission but has, with few exceptions, maintained a more formal relationship with the ABA Standing Committee and has not sought preliminary ratings on anyone but the individual the Administration has already settled on to nominate.[8] This has also meant that unlike previous Republican Administrations which pledged not to nominate any person rated "Not Qualified" by the ABA Standing Committee,[9] this Administration has made no such pledge and is willing, if not persuaded by the Committee, to nominate the person of its choice even were the nominee rated "Not Qualified."[10]

This is not to suggest that relations were cool with the ABA Committee. Senate Judiciary Committee hearings on the nomination of J. Harvie Wilkinson to the Fourth Circuit revealed a close working relationship, but that relationship occurred *after* the Administration had decided on Wilkinson, not before.[11] Of course, the Administration has been concerned that its nominees receive high ABA ratings, but evidently it has not been willing to give the ABA Standing Committee an opportunity to influence the selection during the more fluid pre-nomination stage.

One further observation about the selection process is in order. The Reagan Administration repudiated the selection commission concept and in so doing abandoned the most potentially effective mechanism for expanding the net of possible judicial candidates to include women and racial minorities, groupings historically excluded from the judiciary. The Carter Administration's record in this regard was unprecedented, with Carter naming to the courts of appeals 11 women, nine black Americans (including one black woman), two Hispanics, and the first person of Asian ancestry (out of a total of 56 appointments). The Reagan record with regard to the appeals courts, as will be discussed shortly, falls markedly short of that.

8. *Id.*

9. But note on his last day in office President Richard M. Nixon broke that pledge. For details see Goldman and Jahnige, *supra* n. 6, at 44-45.

10. In fact this happened with the nomination of Sherman E. Unger to the U.S. Court of Appeals for the Federal Circuit. Unger was rated Not Qualified. However, he died during Senate consideration of his nomination.

11. In particular, see the hearings of the special session of the Senate Judiciary Committee held on August 7, 1984, HEARINGS BEFORE THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, NINETY-EIGHTH CONGRESS, SECOND SESSION, PART 3 SERIAL NO. J-98-6, 272-274, 280, 283 ff. (Washington, D.C.: U.S. Governmen Printing Office, 1985).

District court appointments

The findings for selected backgrounds and attributes of the 129 Reagan first term appointments to the federal district courts are presented in Table 1. Also presented in the Table are comparable findings for the Carter, Ford, Nixon, and Johnson Administrations' appointees.

Occupation: If we look at the occupation at time of appointment we find that about 40 per cent were members of the judiciary on the state bench or, in several instances, U.S. magistrates or bankruptcy judges. Only the Carter Administration of the past five administrations had a higher proportion of those who were serving as judges at the time they were chosen for the federal district bench. About eight per cent of the Reagan district court appointees were in politics or governmental positions but few of these were U.S. Attorneys; this also had been true for the Carter appointees but not for the appointees of previous administrations. It would appear, for whatever the reason,[12] that the U.S. Attorney position is not the direct stepping-stone to a federal judgeship it once was, although both federal and state prosecutorial experience was prominent in the backgrounds of the judges. Also of note is that few law school professors were appointed, in contrast to the Reagan record for the courts of appeals. The Carter, Nixon, and Johnson Administrations appointed proportionately more law school professors than did Reagan in his first term.

Private law practice was the occupation at time of appointment for close to half the Reagan appointees. The range of the size of firm varied considerably, with close to 12 per cent affiliated with large firms (with 25 or more partners and/or associates) and a slightly lower proportion at the other end of the spectrum practicing in firms with four or fewer members or associates. This is roughly comparable to the distribution of the Carter appointees. Since the Johnson Administration, proportionately fewer of those in a small practice have been chosen. Close to one out of four Johnson appointees, but only about one in seven Carter and one in ten Reagan first term appointees came from a small practice. Perhaps this is a reflection of the changing nature of the practice of law.[13]

Experience: Over 70 per cent of the first term Reagan district court appointments had either judicial or prosecutorial experience, a proportion comparable to the appointees of the Carter Administration, and the second highest of all five administrations' appointees. Of special interest and importance is that the proportion of those with judicial experience exceeded the proportion of those with prosecutorial experience—a trend begun only in the Carter Administration. Before Carter, prosecutorial experience was more frequent.

Why the shift toward a greater emphasis on judicial experience? The reasons may be twofold. First, to the extent that judicial selection commissions are involved in judicial selection, and as many as 18 Republican senators in 14 states have employed them during Reagan's first term,[14] judicial experience will be seen as a desirable and relevant credential. Commissions have been concerned with the professional quality of prospective nominees, and those with judicial experience have a professional track record that can be evaluated. Second, such track records can also be scrutinized by Justice Department officials to determine if the candidate shares the Administration's judicial philosophy and ideological outlook.[15] The result of this recent emphasis on judicial experience may be the growing professionalization of the American judiciary.

Education: The educational background of a majority of Reagan appointments to the district courts, as shown in Table 1, was private school including the highly prestigious Ivy League schools. Only about one-third of Reagan appointees attended a public university for undergraduate work, whereas over 57 per cent of the Carter appointees attended public colleges—perhaps a reflection of

12. See the discussion of possible reasons in Goldman, *Reagan's judicial appointments at mid-term: shaping the bench in his own image*, 66 JUDICATURE 334, at 337 (1983).

13. Cf. Goldman and Jahnige, *supra* n. 6, at 56. In general, see, THE 1984 LAWYER STATISTICAL REPORT: A PROFILE OF THE LEGAL PROFESSION IN THE UNITED STATES (Chicago: American Bar Foundation, in press).

14. Fowler, *A Comparison of Initial Recommendation Procedures: Judicial Selection Under Reagan and Carter*, 1 YALE L. & POL'Y REV. 299, 310-20, 347-49 (1983).

15. Interview with Jane Swift, *supra* n. 7.

poorer socioeconomic roots of a substantial segment of the Carter judges. Again, with law school education, the majority of the Reagan appointees attended private law schools while a bare majority of the Carter appointees attended public-supported law schools.

Although there are some problems with equating being able to attend a private undergraduate college with socioeconomic status, the argument can be made that it is a rough indicator.[16] The findings for the Reagan appointees are consistent with earlier findings[17] and compatible with findings from other studies suggesting that the socioeconomic differences between the Republican and Democratic electorates are mirrored to some degree in the appointments of Republican and Dem-

16. See the discussion in Goldman, *supra* n. 12, at 339.
17. *Id.*

Table 1 How the Reagan first term appointees to the district courts compare to the appointees of Carter, Ford, Nixon, and Johnson

	Reagan (first term) % N	Carter % N	Ford % N	Nixon % N	Johnson % N
Occupation:					
Politics/government	7.8% 10	4.4% 9	21.2% 11	10.6% 19	21.3% 26
Judiciary	40.3% 52	44.6% 90	34.6% 18	28.5% 51	31.1% 38
Large law firm					
100+ partners/associates	3.1% 4	2.0% 4	1.9% 1	0.6% 1	0.8% 1
50-99	3.1% 4	6.0% 12	3.9% 2	0.6% 1	1.6% 2
25-49	5.4% 7	6.0% 12	3.9% 2	10.1% 18	— —
Moderate size firm					
10-24 partners/associates	12.4% 16	9.4% 19	7.7% 4	8.9% 16	12.3% 15
5-9	13.2% 17	10.4% 21	17.3% 9	19.0% 34	6.6% 8
Small firm					
2-4 partners/associates	8.5% 11	11.4% 23	7.7% 4	14.5% 26	11.5% 14
Solo practitioner	2.3% 3	2.5% 5	1.9% 1	4.5% 8	11.5% 14
Professor of law	2.3% 3	3.0% 6	— —	2.8% 5	3.3% 4
Other	1.6% 2	0.5% 1	— —	— —	— —
Experience:					
Judicial	50.4% 65	54.5% 110	42.3% 22	35.2% 63	34.4% 42
Prosecutorial	43.4% 56	38.6% 78	50.0% 26	41.9% 75	45.9% 56
Neither one	28.7% 37	28.2% 57	30.8% 16	36.3% 65	33.6% 41
Undergraduate education:					
Public-supported	34.1% 44	57.4% 116	48.1% 25	41.3% 74	38.5% 47
Private (not Ivy)	49.6% 64	32.7% 66	34.6% 18	38.5% 69	31.1% 38
Ivy League	16.3% 21	9.9% 20	17.3% 9	19.6% 35	16.4% 20
None indicated	— —	— —	— —	0.6% 1	13.9% 17
Law school education:					
Public-supported	44.2% 57	50.5% 102	44.2% 23	41.9% 75	40.2% 49
Private (not Ivy)	47.3% 61	32.2% 65	38.5% 20	36.9% 66	36.9% 45
Ivy League	8.5% 11	17.3% 35	17.3% 9	21.2% 38	21.3% 26

ocratic Administrations.[18] This has particular persuasiveness in light of the net worth findings presented in Table 2. In sum, we can observe that with relatively few exceptions, there is a tendency for the typical Republican appointee to be of a higher socioeconomic status than the typical Democratic appointee.

18. See Goldman and Jahnige, *supra* n. 6, at 52-57.
19. Goldman, *supra* n. 12, at 340.

A word about the professional education of the appointees is in order. A study of the Reagan appointees at mid-term tentatively concluded that as a group the Reagan appointees might have had a marginally less distinguished legal education than the appointees of the four previous presidents.[19] This was based on the relatively small proportion of appointees with an Ivy League law school education, the smallest proportion over the

	Reagan *(first term)* % *N*	Carter % *N*	Ford % *N*	Nixon % *N*	Johnson % *N*
Gender:					
Male	90.7% *117*	85.6% *173*	98.1% *51*	99.4% *178*	98.4% *120*
Female	9.3% *12*	14.4% *29*	1.9% *1*	0.6% *1*	1.6% *2*
Ethnicity or race:					
White	93.0% *120*	78.7% *159*	88.5% *46*	95.5% *171*	93.4% *114*
Black	0.8% *1*	13.9% *28*	5.8% *3*	3.4% *6*	4.1% *5*
Hispanic	5.4% *7*	6.9% *14*	1.9% *1*	1.1% *2*	2.5% *3*
Asian	0.8% *1*	0.5% *1*	3.9% *2*	— —	— —
A.B.A. ratings:					
Exceptionally well qualified	6.9% *9*	4.0% *8*	— —	5.0% *9*	7.4% *9*
Well qualified	43.4% *56*	47.0% *95*	46.1% *24*	40.2% *72*	40.9% *50*
Qualified	49.6% *64*	47.5% *96*	53.8% *28*	54.8% *98*	49.2% *60*
Not qualified	— —	1.5% *3*	— —	— —	2.5% *3*
Party:					
Democratic	3.1% *4*	92.6% *187*	21.2% *11*	7.3% *13*	94.3% *115*
Republican	96.9% *125*	4.9% *10*	78.8% *41*	92.7% *166*	5.7% *7*
Independent	— —	2.5% *5*	— —	— —	— —
Past party activism:	61.2% *79*	60.9% *123*	50.0% *26*	48.6% *87*	49.2% *60*
Religious origin or affiliation:					
Protestant	61.2% *79*	60.4% *122*	73.1% *38*	73.2% *131*	58.2% *71*
Catholic	31.8% *41*	27.7% *56*	17.3% *9*	18.4% *33*	31.1% *38*
Jewish	6.9% *9*	11.9% *24*	9.6% *5*	8.4% *15*	10.7% *13*
Total number of appointees	129	202	52	179	122
Average age at appointment	49.6	49.7	49.2	49.1	51.4

past five administrations. The proportion has remained constant for the entire first term appointments. However, the same caveat noted earlier must be repeated here—that is, that a number of Reagan appointees as well as appointees of other presidents attended distinguished non-Ivy League schools including Michigan, Virginia, Berkeley, Stanford, and N.Y.U. Interestingly, a study conducted by Fowler found that a smaller proportion of the Reagan appointees than the Carter appointees attended "prestige" law schools,[20] which supports the earlier conclusion that the Reagan appointees' legal education, on the whole, was marginally less distinguished than the appointees of previous presidents.

Affirmative action: The record of the Reagan first term district court appointments is a mixed one with regard to gender and race/ethnicity. The Reagan Administration was, of course, responsible for the historic appointment of the first woman to the Supreme Court. At the district court level, the record, as indicated by Table 1, shows that the Reagan Administration's appointment of women was second only to the Carter Administration.

20. Fowler, *supra* n. 14, at 350.

The appointees' political and legal credentials

Among the Reagan appointees to the lower courts confirmed by the Senate of the 98th Congress are the following persons with political and legal credentials worthy of special note.[1]

- Sarah Evans Barker was active in Republican politics in Indiana and also played an important role in Illinois Republican Senator Charles Percy's reelection campaign in 1972. She served as assistant U.S. Attorney for the southern district of Indiana and eventually became the U.S. Attorney.
- Robert R. Beezer was once active in Seattle Republican politics. He had experience as a municipal court judge as well as a special prosecuting attorney. He was a member of a major Seattle law firm at the time of his appointment to the U.S. Court of Appeals for the Ninth Circuit.
- Franklin S. Billings, Jr., once a leading Vermont legislator serving as secretary of the Vermont Senate and later as Speaker of the House, was Chief Justice of the Vermont Supreme Court when chosen for the federal district bench.
- Peter C. Dorsey was a candidate for state attorney general in his native Connecticut, and had served as U.S. Attorney.
- Julia Smith Gibbons had been active in the campaigns of Tennessee Republicans Senator Howard Baker and Governor Lamar Alexander, and served as a Tennessee circuit court judge for the 15th Judicial Circuit.
- Elizabeth V. Hallanan had been a member of the West Virginia House of Delegates, was co-chair in 1976 of the West Virginia Committee to Elect Gerald Ford, served as Chair of the Public Service Commission of West Virginia, and had experience as a juvenile court judge.
- Stanley S. Harris was a former law partner of Republican Senator John Warner and served on the local District of Columbia courts before being appointed U.S. Attorney for the District of Columbia. He was rated Exceptionally Well Qualified by the ABA for the federal district court position on the District of Columbia bench.
- Robert M. Hill had been active in Re-

1. *See* Goldman, *Reagan's judicial appointments at mid-term: shaping the bench in his own image*, 66 JUDICATURE 334, at 341 (1983) for examples of those with impressive political and legal credentials confirmed by the Senate of the 97th Congress. It should be understood that the listing is not exhaustive and that there are those not mentioned who also had noteworthy legal credentials.

Over nine per cent of the appointments went to women, and this suggests that the Administration, as well as some Republican senators, made an effort to recruit well qualified women. While it is true that the large majority of all appointees of all five administrations have been male, the Reagan Administration must be given credit for continuing the push for sexual equality in the recruitment of federal district judges. It is also significant to note that by the end of the first term two women held important Justice Department positions that are concerned with judicial selection: Carole Dinkins as Deputy Attorney General and Jane Swift as Special Counsel for Judicial Selection in the Office of Legal Policy. It is likely that women in key Justice Department positions will be sensitive to sexual discrimination in the judicial selection process.

The record as to black appointments, however, is markedly different. The Reagan first term record is not only the worst of all five administrations, as suggested by Table 1, it is the worst since the Eisenhower Administration in which no blacks were appointed to life-time district court positions. Justice Department officials are aware of this poor

publican politics before being appointed by President Richard M. Nixon to the federal district bench in 1970. President Reagan elevated him in 1984 to the Court of Appeals for the Fifth Circuit.

- Ricardo H. Hinojosa was a county Republican Party chairman, was south Texas co-chairman of the Reagan-Bush campaign in 1980, was active in other Republican campaigns, and was an associate in a major McAllen, Texas, law firm at the time he was picked for the federal district bench.
- Thomas Gray Hull was a Tennessee state legislator, served as a Tennessee circuit court judge for the 20th Judicial Circuit, and was legal counsel to Governor Lamar Alexander.
- Marvin Katz was a former law partner of Republican Senator Arlen Specter and was a member of a prestigious Philadelphia law firm at the time of his appointment to the federal district court.
- Charles A. Legge was vice chair of the San Francisco Lawyers Committee for Reagan-Bush and was a partner in a major San Francisco law firm at the time of his appointment.
- Peter K. Leisure had been active in Republican campaigns, had service as an assistant U.S. Attorney, and was a member of a major New York City law firm.
- H. Ted Milburn was active in the Howard Baker and Nixon-Agnew campaigns and was serving as a Tennessee circuit court judge for the 6th Judicial Circuit when recruited for the federal district bench in 1983. In October of 1984 he was elevated to the U.S. Court of Appeals for the Sixth Circuit.
- Edward C. Prado was active in his home county Republican Party, served as an assistant district attorney, had experience as a state district judge, and was U.S. Attorney for the Western District of Texas when picked for the federal district court bench.
- Ilana Diamond Rovner was active in Republican campaigns in Illinois including service as Vice Chair of the Illinois Finance Committee for Reagan-Bush. She served as an Assistant U.S. Attorney for four years and was Legal Counsel to Governor James Thompson when chosen for the federal district court bench.
- Anthony J. Scirica was a member of the Pennsylvania General Assembly, had served as an assistant district attorney, and was a state judge at the time he was picked for the federal district court bench.

—Sheldon Goldman

record and have said they would like it to improve, but feel that it is extraordinarily difficult to find well qualified blacks who share the President's philosophy and are also willing to serve.[21] Critics respond that the Administration has not made the recruitment of blacks a high priority in part because the black electorate votes overwhelmingly Democratic, and there is little political payoff in the appointment of blacks. In contrast, the proportion of Hispanics was second only to that of the Carter Administration. Some observers link that fact to the Republican Party effort to woo Hispanic voters in the 1984 election.

ABA ratings and other factors: When we examine the ratings of the ABA Standing Committee on Federal Judiciary we find that about seven per cent of the Reagan first term appointees to the district courts received the highest rating, that of Exceptionally Well Qualified. This is the best record since the Johnson Administration. The next highest rating, that of Well Qualified, was received by about 43 per cent, which means that half the Reagan appointees were in the top two categories. The Carter appointees received proportionately more Well Qualified ratings than did the Reagan appointees but fewer Exceptionally Well Qualified ratings. However, when the top two ratings are combined, 51 per cent of the Carter appointees fell into those categories—about the same as the Reagan appointees. If the ABA ratings are taken as a rough measure of "quality," the Reagan appointments may be seen as equaling the Carter appointees in quality and marginally surpassing the appointments of Ford, Nixon, and Johnson.

In terms of party affiliation of district court appointees, approximately 97 per cent of the Reagan appointees were Republican, the highest partisanship level of all five administrations and the highest proportion of a president choosing members of his own party since Woodrow Wilson.[22] The figures for previous prominent party activism suggest that the Reagan appointees had the highest proportion of all five administrations. However, there is no suggestion that the Reagan appointees with a record of party activism received their appointments solely because of their political activities. Instead, it must be recognized that a history of party activity is helpful to a judicial candidacy only when other factors are present such as distinguished legal credentials, and, particularly as far as the Reagan Administration is concerned, a judicial philosophy in harmony with that of the Administration. Suffice it to note that many of the Reagan appointees to both the district and appeals courts had impressive legal credentials as well as a background of partisan activism (see "The appointees' political and legal credentials," page 320). Also observe that about four out of ten Reagan appointees did *not* have a record of prominent partisan

Table 2 Net worth of Reagan appointees compared to the net worth of the Carter appointees

	Reagan (first term)		Carter (96th Congress)	
	District	Appeals	District	Appeals
	%	%	%	%
	N	N	N	N
Under $100,000	6.2%	3.3%	12.8%	5.1%
	8	1	19	2
100,000-150,000	8.5%	3.3%	14.9%	12.8%
	11	1	22	5
150,000-199,999	3.9%	3.3%	8.1%	15.4%
	5	1	12	6
0-199,999 total	18.6%	10.0%	35.8%	33.3%
	24	3	53	13
200,000-399,000	25.6%	23.3%	29.7%	28.2%
	33	7	44	11
400,000-499,000	11.6%	13.3%	11.5%	10.3%
	15	4	17	4
500,000-999,999	21.7%	30.0%	18.9%	17.9%
	28	9	28	7
200,000-999,999 total	58.9%	66.7%	60.1%	56.4%
	76	20	89	22
1 to 2 million	17.0%	20.0%	2.0%	7.7%
	22	6	3	3
over 2 million	5.4%	3.3%	2.0%	2.6%
	7	1	3	1
1+ million total	22.5%	23.3%	4.0%	10.3%
	29	7	6	4
Total %	100.0%	100.0%	99.9%	100.0%
Total number of appointees	129	30[1]	148[2]	39[3]

1. Net worth unavailable for one appointment. Source for all other Reagan appointees was the questionnaires submitted to the Senate Judiciary Committee and reviewed by the author.
2. Professor Elliot Slotnick generously provided the net worth figures for all but six appointees for whom he had no data.
3. There were five additional judges appointed by Carter for whom no information was listed in the source consulted, *Legal Times of Washington*, October 27, 1980, at 25.

21. Interview with Jane Swift, *supra* n. 7.

22. See Evans, *Political Influences in the Selection of Federal Judges*, WIS. L. REV. 330-51 (1948) reprinted in Scigliano, ed., THE COURTS 65-69 (Boston: Little Brown, 1962). Also see, Burns, Peltason, and Cronin, GOVERNMENT BY THE PEOPLE, 9th ed., 406 (Englewood Cliffs, New Jersey: Prentice-Hall, 1975).

activism, although they of course had to receive sufficient political backing or clearance in order to have been nominated.

The religious origins or religious affiliation of the Reagan first term district court appointees differed markedly from the appointees of previous Republican administrations; Reagan appointed more Catholics and fewer Protestants—proportions similar to those of Democratic administrations. In fact, as Table 1 shows, the Republican Reagan Administration appointed proportionately more Catholics than did the Democratic Carter and Johnson Administrations. In the past, Republican administrations appointed more Protestants and fewer Catholics and Jews than did Democratic administrations; this could be attributed to the fact that the religious composition or mix of the parties was different and thus, to a large extent, so was the pool of potential judicial candidates from both parties. The finding for the Reagan appointees does not mean that the Administration gave greater preference to Catholics because of their religion than did previous Republican administrations, but rather that more Catholics have entered the potential pool from which Republican judicial nominees emerge thus increasing their proportion of appointees. This is consistent with the relatively heavy Catholic vote for Reagan in 1980 and especially 1984.

The average age of the Reagan appointees was about that of the Carter appointees and similar to that of the appointees of the previous three presidents.

The net worth of the Reagan appointees as compared to the Carter appointees is presented in Table 2. There are differences in degree at both ends of the financial spectrum. There were proportionately more millionaires among the Reagan district court appointees, over five times as many as the Carter appointees, and proportionately fewer Reagan appointees at the lower end of the economic spectrum. This suggests, along the lines reported in the 1983 study of Reagan appointees,[23] that there is somewhat of a class difference between the Republican and Democratic appointees on the whole that is analogous to the socioeconomic differences among the electorates of the two parties. However, the findings also suggest that the Reagan and Carter appointees were for the most part drawn from the middle to upper classes.

Appeals court appointments

Traditionally, senators of the president's party have had considerably less influence in the selection of appeals court as distinct from district court judges. This has meant that administrations have had more of an opportunity to pursue their policy agendas (such as they may have them) by way of recruiting appeals judges who are thought to be philosophically sympathetic with such agendas. We can so view the 31 first term Reagan appointments to the courts of appeals with general jurisdiction as compared to the 56 Carter, 12 Ford, 45 Nixon and 40 Johnson appointees. Because there are fewer appeals judges than district judge appointments, differences in percentages, as reported in Table 3, must be treated with caution.

Occupation and experience: A striking finding of Table 3 is that three out of five Reagan appeals court appointees and over half the Ford, Nixon, and Johnson appointees were already serving in the judiciary at the time of their appointment to the courts of appeals. Of the 19 Reagan appointees who were judges at the time of appointment, 16 were serving as federal district judges and the remaining three on the state bench. Just as with the selection of federal district judges, Justice Department officials felt more secure evaluating the candidacies of those with judicial track records. The Reagan Administration was particularly concerned not only with the professional quality of prospective nominees, but also with their judicial philosophy. As presidential counsel Fred F. Fielding noted, "We have an opportunity to restore a philosophical balance that you don't have across the board right now."[24]

The promotion of a lower court judge to a higher court can also be seen as furthering the concept of a professional judiciary, although

23. Goldman, *supra* n. 12, at 345-46.

24. Brownstein, *With or Without Supreme Court Changes, Reagan will Reshape the Federal Bench*, 16 NATIONAL JOURNAL 2238 at 2340 (December 8, 1984).

it does not appear that pure merit was the governing factor with the Reagan first term elevations.[25] The same undoubtedly holds true for the appointments of other administrations. Politically, the elevation of a federal district judge enables an administration to make two appointments: the elevation that fills the appeals court position; and the appointment to fill the vacancy thus created on the federal district bench.

Another striking finding of Table 3 is the proportion of Reagan appeals court appointees who were law school professors at the time of appointment. Because Robert Bork

25. If the ABA ratings are taken as overall indicators of quality, only 4 of the 19 judicial promotions were rated Exceptionally Well Qualified, 12 received the Well Qualified designations, and 3 were given the lowest rating of Qualified.

Table 3 How the Reagan first term appointees to the courts of appeals compare to the appointees of Carter, Ford, Nixon, and Johnson

	Reagan (first term) % N	Carter % N	Ford % N	Nixon % N	Johnson % N
Occupation:					
Politics/government	3.2%	—%	8.3%	4.4%	10.0%
	1	—	1	2	4
Judiciary	61.3%	46.4%	75.0%	53.3%	57.5%
	19	26	9	24	23
Large law firm					
100+ partners/associates	—	1.8%	—	—	—
	—	1	—	—	—
50-99	3.2%	5.4%	8.3%	2.2%	2.5%
	1	3	1	1	1
25-49	6.4%	3.6%	—	2.2%	2.5%
	2	2	—	1	1
Moderate size firm					
10-24 partners/associates	3.2%	14.3%	—	11.1%	7.5%
	1	8	—	5	3
5-9	6.4%	1.8%	8.3%	11.1%	10.0%
	2	1	1	5	4
Small firm					
2-4 partners/associates	—	3.6%	—	6.7%	2.5%
	—	2	—	3	1
Solo practitioner	—	1.8%	—	—	5.0%
	—	1	—	—	2
Professor of law	16.1%	14.3%	—	2.2%	2.5%
	5	8	—	1	1
Other	—	1.8%	—	6.7%	—
	—	1	—	3	—
Experience:					
Judicial	70.9%	53.6%	75.0%	57.8%	65.0%
	22	30	9	26	26
Prosecutorial	19.3%	32.1%	25.0%	46.7%	47.5%
	6	18	3	21	19
Neither one	25.8%	37.5%	25.0%	17.8%	20.0%
	8	21	3	8	8
Undergraduate education:					
Public-supported	29.0%	30.4%	50.0%	40.0%	32.5%
	9	17	6	18	13
Private (not Ivy)	45.2%	50.0%	41.7%	35.6%	40.0%
	14	28	5	16	16
Ivy League	25.8%	19.6%	8.3%	20.0%	17.5%
	8	11	1	9	7
None indicated	—	—	—	4.4%	10.0%
	—	—	—	2	4
Law school education:					
Public-supported	35.5%	39.3%	50.0%	37.8%	40.0%
	11	22	6	17	16
Private (not Ivy)	48.4%	19.6%	25.0%	26.7%	32.5%
	15	11	3	12	13
Ivy League	16.1%	41.1%	25.0%	35.6%	27.5%
	5	23	3	16	11

had left his professorship at Yale Law School some six months before and at the time of selection was a senior partner in the Washington, D.C. firm of Kirkland & Ellis, he was not counted in the professor of law category. Were he counted, the proportion of professors of law would be about one out of five Reagan appeals court appointees, a modern record.

Bork, as well as the five other law professors, were all known as conservative thinkers and advocates of judicial restraint with a tendency toward deference to government in matters of alleged civil liberties or civil rights violations. These appointees also had a track record of published works so that their candidacies could be evaluated as to their compatibility with the Administration's vision of the role of the courts. Further, the appointment of

	Reagan (first term) % N	Carter % N	Ford % N	Nixon % N	Johnson % N
Gender:					
Male	96.8%	80.4%	100.0%	100.0%	97.5%
	30	45	12	45	39
Female	3.2%	19.6%	—	—	2.5%
	1	11	—	—	1
Ethnicity or race:					
White	93.5%	78.6%	100.0%	97.8%	95.0%
	29	44	12	44	38
Black	3.2%	16.1%	—	—	5.0%
	1	9	—	—	2
Hispanic	3.2%	3.6%	—	—	—
	1	2	—	—	—
Asian	—	1.8%	—	2.2%	—
	—	1	—	1	—
A.B.A. ratings:					
Exceptionally well qualified	22.6%	16.1%	16.7%	15.6%	27.5%
	7	9	2	7	11
Well qualified	41.9%	58.9%	41.7%	57.8%	47.5%
	13	33	5	26	19
Qualified	35.5%	25.0%	33.3%	26.7%	20.0%
	11	14	4	12	8
Not qualified	—	—	8.3%	—	2.5%
	—	—	1	—	1
No report requested	—	—	—	—	2.5%
	—	—	—	—	1
Party:					
Democratic	—	82.1%	8.3%	6.7%	95.0%
	—	46	1	1	38
Republican	100.0%	7.1%	91.7%	93.3%	5.0%
	31	4	11	42	2
Independent	—	10.7%	—	—	—
	—	6	—	—	—
Past party activism:	58.1%	73.2%	58.3%	60.0%	57.5%
	18	41	7	27	23
Religious origin or affiliation:					
Protestant	67.7%	60.7%	58.3%	75.6%	60.0%
	21	34	7	34	24
Catholic	22.6%	23.2%	33.3%	15.6%	25.0%
	7	13	4	7	10
Jewish	9.7%	16.1%	8.3%	8.9%	15.0%
	3	9	1	4	6
Total number of appointees	31	56	12	45	40
Average age at appointment	51.5	51.9	52.1	53.8	52.2

Only one appeals court nominee was female, one was black, and one, Hispanic.

academics was expected to provide intellectual leadership on the circuits and a potential pool of candidates for vacancies that might occur on the Supreme Court. It will be of more than academic interest to see whether the second term appointments will draw as heavily from the law schools as did those from the first term. Over the last 20 years (and excluding the small number of Ford appointees), the Reagan Administration drew the least from the ranks of those in private practice.

In terms of experience, about three out of four Reagan appointees had judicial or prosecutorial experience in their backgrounds, with judicial experience being the most prominent. Indeed, over three times as many appeals court appointees had judicial experience as had prosecutorial experience, and the proportion with prosecutorial experience was the lowest of the five administrations. This also supports the suggestion that Justice officials were more concerned with judicial track records in evaluating ideological compatibility than with prosecutorial track records.

Education and affirmative action: The majority of the Reagan appointees as well as the Carter, Nixon, and Johnson appointees attended private schools for both their undergraduate and law school training. About one out of four Reagan appointees had an Ivy League undergraduate education, the highest proportion of the appointees of the five administrations. However, the proportion of Reagan appointees with an Ivy League law school education was the *lowest* of all five administrations. Although some of the appointees attended prestigious non-Ivy League law schools both public and private, it may be that the quality of legal education of the Reagan appeals court appointees, like that of the district court appointees, was on the whole somewhat lower than the Carter appointees, a finding also reported by Fowler.[26]

In terms of appointments of women and minorities, the first term Reagan record for the appeals courts can be seen as a dramatic retreat from the Carter record. Of 31 appeals court appointees only one was a woman, only one was black, and only one was Hispanic. Whether the participation of Carole Dinkins (until her departure from the Justice Department in March 1985) and Jane Swift in the selection process will result in the active consideration and recruitment of women to the appeals courts will be something to watch for during the second term. It may be that the male dominated selection process is such that there is greater willingness to recruit women for the district bench than for the more important and prestigious appeals courts. The Administration may also want their women appointees to the district courts to prove themselves on the bench before being actively considered for promotion.

ABA ratings and other factors: The proportion of Reagan appointees with the highest ABA rating, that of Exceptionally Well Qualified, was the highest since the Johnson Administration. However, the Reagan appointees also had the highest proportion of all five administrations of those with the lowest Qualified rating. Interestingly, all five who were professors of law at the time of their nominations were only rated Qualified despite their distinguished legal scholarly achievements. This suggests that the ABA ratings are biased against legal academics who are not active practitioners. Had Robert Bork remained on the Yale Law School faculty rather than joining Kirkland & Ellis, it is a matter of conjecture whether he would have received the Exceptionally Well Qualified rating he in fact received as a senior partner of that prestigious

26. Fowler, *supra* n. 14, at 352.

District of Columbia firm.

None of the Reagan first term appointees to the appeals courts were Democrats. The absence of any appointees affiliated with the opposition political party last occurred in the Administration of Warren Harding.[27] As for prominent past partisan activism, however, the proportion is lower than that for the Carter appointees and comparable to that of the Ford, Nixon, and Johnson appointees (see "The appointees' political and legal credentials," page 320).

As for religious origin or affiliation, the Reagan appeals court appointments were somewhat similar to his district court appointments with the proportion of Catholics akin to that of the previous Democratic Administrations of Carter and Johnson.

Given the importance of the appeals courts and the desire of the Reagan Administration to place on the bench those with a judicial philosophy compatible with that of the Administration, one might expect that there would be an active effort to recruit younger people who could be expected to remain on the bench longer. There is a hint that this may have occurred. The average age of the Reagan appointees was 51.5, the lowest for all five administrations.

The net worth of the Reagan appointees compared to the Carter appointees is found in Table 2 and the differences between both groups of appointees are similar to those for the district court appointees. Over one in five Reagan appointees were millionaires as compared to one in ten Carter appointees. Two-thirds had a net worth between $200,000 and under $1 million, compared to 56 per cent of the Carter appointees. At the lowest end of the net worth continuum, one in ten Reagan appointees had a net worth of under $200,000, compared to one in three of the Carter appointees.

The net worth findings for the appeals courts, as well as the district courts, underscore the importance of Chief Justice Warren Burger's urgent request that Congress dramatically increase the pay of the federal judiciary.[28] The Chief Justice observed that since he became Chief Justice 30 of the 43 resignations from the federal bench were due in part to financial reasons.[29] Although there are differences in degree between the Carter and Reagan appointees' wealth that may mirror to some extent different constituencies of the parties, there is a very real danger that the federal courts will soon become the preserve of the wealthy for only they will be able to afford the assumption of judicial office. If it is considered desirable that monetary considerations not affect judicial recruitment, then judicial salaries will have to be increased significantly.

Ideological success?

We have thus far seen how the Reagan Administration has to some extent reshaped the judicial selection process, and we have examined the demographic and attribute profiles of the Reagan district and appeals court appointees as compared to those of four previous presidents. The questions remain, have the Reagan appointees met the expectations of the Administration? Have the Reagan appointees begun to shift the ideological balance on the lower courts?

The answers to these questions must await systematic empirical analysis; there is fragmentary evidence that has begun to emerge, however, that suggests that the Reagan Administration on the whole is satisfied. For example, a study by the Center for Judicial Studies of every decision published by every Reagan appointee serving during the first two years of Reagan's first term concluded that the overwhelming majority of appointees demonstrated judicial restraint along the lines favored by the Administration.[30]

Students in a seminar at the University of Massachusetts-Amherst conducted a class project in which published decisions of selected appeals courts and Reagan appointees were analyzed.[31] Although these analyses were exploratory and their findings must be interpreted with caution, here, too, it would appear that, with few exceptions, the Reagan

27. *See*, LEGISLATIVE HISTORY OF THE UNITED STATES CIRCUIT COURTS OF APPEALS AND THE JUDGES WHO SERVED DURING THE PERIOD 1801 THROUGH MAY 1972 U.S. Senate, Committee on the Judiciary, 92nd Cong., 2nd Sess. 2 (1972).

28. *See*, Lauter, *Burger Lists 1985 Desires: More Pay, Another Justice*, NATIONAL LAW JOURNAL, January 14, 1985, at 5.

29. *Id.*

30. Brownstein, *supra* n. 24, at 2341.

Future appointees will most likely be white, male and Republican.

appointees have joined the more conservative wings of their courts particularly on issues of alleged violations of civil liberties. Another finding that emerged was that the differences that occurred between the Reagan appointees and the Carter (and other Democratic) appointees were differences of degree and that it was rare for there to be the sort of dramatic cleavages on the appeals courts as is found on the Supreme Court. Nevertheless, the Reagan appointees appear to be making their imprint.

Other accounts of the Reagan appointees on the courts have also focused on the appeals courts. In one, Jonathan Rose, the former Assistant Attorney General for Legal Policy during the first three years of Reagan's first term, was quoted as being "tremendously pleased" with the records of the law professors chosen by the Administration for the appeals courts.[32] An extensive analysis of Robert Bork's record[33] and more anecdotal accounts[34] of other appointees also provide additional evidence on this point.

At the Supreme Court level there is reason for the Administration to be pleased with its appointee Justice Sandra Day O'Connor. O'Connor was either the second or third most conservative justice in matters of civil liberties, rejecting the civil liberties claim in 71 per cent of the cases decided with full opinion in the 1981 term, and in the 1982 and 1983 terms rejecting 75 per cent of such civil liberties arguments. Her opinions, whether for the majority, concurrences, or dissents on a variety of issues ranging from abortion to criminal procedures were surely, with few exceptions, a source of satisfaction to the Administration.

Although political party platforms are notorious for being treated as merely campaign rhetoric, the 1984 Republican Party platform can be seen as containing a good summary of the Reaganizing philosophy for the judiciary that also points the way for the second term. The platform reads in part:

> Judicial power must be exercised with deference towards state and local officials.... It is not a judicial function to reorder the economic, political, and social priorities of our nation.... We commend the President for appointing federal judges committed to the rights of law-abiding citizens and traditional family values.... In his second term, President Reagan will continue to appoint Supreme Court and other federal judges who share our commitment to judicial restraint.[35]

Future appointments

Although the above quote from the 1984 Republican Party platform does suggest the ideological or philosophical outlook of the people the Administration will be seeking for judgeships during the second term, we can also offer some projections as to the likely makeup of the demographic and attribute profiles of second term appointees. Central to this undertaking is the realization that just as there was no indication at the start of the second term that there would be sharp alterations in other areas of public policy, so with the judiciary there is no reason to anticipate a shift in the course already set during the first term. What this means is that second term appointees will continue to be predominantly

31. The seminar was held in the Fall of 1984. The students involved were: Karen Ahlers, Julia L. Anderson, Leslie A. Brown, Nicole M. Caron, Michael J. Deltergo, Kathleen M. Moore, Matthew F. Moran, Paul M. Shepard, Barry J. Siegel, Valerie Singleton, David A. Smailes, and Paul W. Throne. Cases were generally classified using the methods described in Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491 (1975). The circuits examined were the Second, Third, Fourth, Fifth, Sixth, Seventh, and the District of Columbia. Separate studies of Reagan appointees Robert Bork, Lawrence Pierce, Richard Posner, Antonin Scalia, and Ralph Winter were also conducted.

32. LEGAL TIMES OF WASHINGTON, October 22, 1984, at 15.

33. *Id.* at 1, 10-15.

34. *See, for example,* NEW YORK TIMES, August 23, 1984, at B-8 and BOSTON GLOBE, July 29, 1984, at A-28.

35. See the text of the 1984 Republican Party platform and in particular the quoted material in 42 CONGRESSIONAL QUARTERLY WEEKLY REPORT 2110 (August 25, 1984).

white male Republicans, many of whom are at the upper end of the socioeconomic spectrum. Women will likely continue to receive appointments at a level comparable to that for the first term, which will place the Reagan Administration second only to the Carter Administration in terms of appointments to women. As for black Americans, there is no reason to believe that there will be a marked change from the poor record of the first term during the second term.

Judicial experience should continue to be important for the Administration and used to assess the track record of prospective appointees. For the courts of appeals, law school professors will likely continue to hold some attraction for the Administration, both because of the relative ease of identifying a judicial philosophy from published writings and the desire to place conservative intellectual leaders on these important collegial courts.

It will be of interest to see whether the Administration broadens its recruitment efforts, particularly at the appeals court level, to find Democrats who share the Administration's outlook or whether the extreme partisanship discussed previously will prevail during the second term.

Of major interest during the second term will be the filling of any Supreme Court vacancies that occur. There is frequent speculation along these lines in the media.[36] How a Supreme Court vacancy is filled will signal the seriousness of the Administration's ideological goals. If the Administration turns to a conservative personal friend of the President's not known for intellectual brilliance instead of one of the conservative intellectual leaders on the appeals courts, it may be interpreted as a failure to fully utilize the power of appointment to most effectively reshape judicial policy.

There has also been speculation about the Chief Justiceship. If the Chief Justiceship becomes vacant, it is possible that Justice O'Connor would be elevated to that position, thus enabling the Administration to make another historic appointment and at the same time have an associate justiceship to fill. But even if the President makes *no* Supreme Court appointments, the Reagan Administration will have left an indelible mark on the judiciary and the course of American law with its lower court appointments.

Ours is a historic political era that in the pendulum of American politics has come every 30 to 40 years.[37] The era of New Deal Democratic political domination of American politics ended with the election of 1968. In all likelihood, were it not for Watergate, the new conservative Republican era would then have been firmly established. It took Ronald Reagan and his Administration to seize the historic opportunity to reshape American politics. Barring economic or military catastrophies, the cycle of conservative Republican domination may well last until the turn of the century. The Reagan Administration correctly sees the courts as having the power to further or hinder Administration goals; thus judicial appointments are of major importance for this Administration in its attempt to reshape public policy. How successful the Administration will ultimately be must await more extensive analysis of the judicial decisionmaking of the first and second term appointments.

The Roosevelt Administration was successful in its struggle with the federal judiciary and the federal courts abandoned or modified interpretations of the Constitution that, in the name of economic liberty, had prevented government from acting in certain areas of economic and social welfare policy. The crucial question now is will the Reagan Administration be successful in its struggle with the federal judiciary to have the federal courts abandon or modify interpretations of the Constitution that, in the name of civil liberty, place restraints on government when acting in certain areas concerning protection from criminals, public morality, and social policy? It is no surprise that students of the courts will be intently watching judicial appointments by a second term Reagan Administration. □

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36. See, for example, Stark, *Will Court Bear Reagan Brand?* BOSTON GLOBE, July 29, 1984, at A-25, A-28.

37. The argument that follows draws in part from the analysis presented in Goldman and Jahnige, *supra* n. 6, at 229-33.

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The federal judiciary: what role politics?

At the mid-year meeting of the American Judicature Society on February 16 in Detroit, Fred W. Friendly led a panel of 15 lawyers, judges, journalists, public officials and others in an examination of the federal judicial selection process. The discussion was in two parts: the filling of a vacancy on the Supreme Court and several vacancies at the appellate and district court level.

Here is an edited transcript of the panel's dialogue on the selection of a new Supreme Court justice. Although space did not permit publication of the full transcript, every effort has been made to avoid distorting the participant's views.

Fred W. Friendly: Let's make it the year 1989. The most aged member of the court is 88 years old. His name is Oliver Brandeis Vision. Judge Vision is everything that a Supreme Court Justice should be. He's a great patriot. He combines all the values of all the people.

One day Judge Vision is at a reception at the White House and as he's about to leave, he says to the President of the United States, Mr. McKay, "Mr. President, could Bessie and I stay for a few minutes afterward, we'd like to chat with you." Would you let him stay?

Robert McKay: Of course.

Friendly: Then you go into the Lincoln bedroom and sit before the fireplace and he tells you that he is thinking of retiring. You say all the appropriate things and he says "but I haven't quite decided to do it yet." I haven't told you by the way that he's black—he's the third black member of the Supreme Court of the United States, and he says, "I will retire on my next birthday, which is in five weeks. But, Mr. President, I would like a promise from you that you will appoint a distinguished black jurist to take my place on the Supreme Court of the United States. This conversation is just between you and me. Do we have a deal?"

McKay: The answer is I could make no such deal. I would certainly take it into consideration, but measuring the qualifications of the individual you have in mind against all others, I would have to think about that.

Friendly: I have no individual in mind. I just want a promise from you that there will be a black seat. There's been one since the days of Lyndon Johnson who appointed Thur-

Fred W. Friendly

good Marshall. I want a promise from you that there will be a black member of the Supreme Court.

McKay: I would be very sensitive to the need to have black representation on the Court.

Friendly: Are you saying the answer is yes?

McKay: No sir. Not a guarantee.

* * * *

Friendly: How does a judge retire? Does he write the President? Does he write to Mr. Civiletti? Does he write to Mr. Schmults? What's the process?

Charles W. Joiner: My understanding is he writes a letter to the President saying that he retires.

Friendly: You write the President. What does he do? Is he the first one to see it?

Benjamin Civiletti: It depends. Of course the letter is the formal act but sometimes I understand messages have been sent or carried in such a scenario as you proposed to alert the President or Attorney General that there is a potential or an expectation of retirement within a certain period of time. The first thing I think the President does, if there has been no preadvice, is to call the Attorney General and probably the White House counsel and have a meeting about the process of selecting an alternative.

Friendly: You've got a letter delivered by hand, and it's sent to the President of the United States and it says, "As of the first of January I wish to announce my retirement. I hope you will remember our conversation about appointing a black to the Court; it's very important that we have this representation in our day and age." You call in your Attorney General and your Deputy Attorney General?

McKay: I would think so.

Friendly: What do you say to them?

McKay: I say, "We now have, as you perhaps are already aware, a potential vacancy on the Court. This is one of the most important appointments that a President can make and so I want you to make an immediate investigation of all those who have been recommended."

Friendly: Well nobody has recommended anybody, have they, because there's no vacancy? Do people go along all the time making recommendations in limbo?

McKay: They do indeed.

Friendly: Really?

McKay: There is always a list of candidates for the Supreme Court of the United States.

Friendly: All right. So how does this conversation conclude? "Go get me the best person?"

McKay: Not necessarily the best person, but get the recommendations that come from responsible sources from around the country and look at them and begin screening them through the American Bar Association. When you have a narrower list, come back to me.

The participants on the panel

Moderator: **Fred W. Friendly,** Edward R. Murrow Professor Emeritus, Columbia University Graduate School of Journalism. Participants: **William J. Bauer,** Judge, U.S. Court of Appeals for the Seventh Circuit; **Benjamin R. Civiletti,** Former U.S. Attorney General; **Charles Halpern,** Dean, CUNY—Queens School of Law; **Charles W. Joiner,** Judge, U.S. District Court for the Eastern District of Michigan; **Elaine R. Jones,** NAACP Legal Defense Fund; **Wade H. McCree, Jr.,** University of Michigan Law School and former judge, U.S. Court of Appeals for the Sixth Circuit; **Robert B. McKay,** President, Association of the Bar of the City of New York, and former dean, N.Y.U. School of Law; **Robert D. Raven,** Former Chairman, ABA Standing Committee on the Federal Judiciary; **Jonathan E. Rose,** Former Assistant Attorney General, Office of Legal Policy, U.S. Department of Justice; **Maurice Rosenberg,** Columbia University Law School; **Edward C. Schmults,** Former U.S. Deputy Attorney General; **Elliot E. Slotnick,** Professor of Political Science, Ohio State University; **Augustine T. Smythe,** Esquire, South Carolina; **Joseph Tybor,** *Chicago Tribune;* **Stephen Wermiel,** *Wall Street Journal.*

Friendly: What do you mean the American Bar Association? They have a big prior restraint on this?

McKay: The ABA helps in the screening by making an investigation throughout the country.

Friendly: This early? Mr. Raven you're an expert on this. Is that the way it works?

Robert Raven: Well, the last time two names were sent to the committee.

Friendly: By the American Bar Association?

Raven: No, by the President through the Attorney General.

Friendly: But does the Bar Association send in names.

Raven: No. The Standing Committee of the ABA has never sponsored anyone. In fact, the few times it's been asked to, it made it very clear that that's not its function. It's not in the selection process at all. It's merely in the evaluation process for the Attorney General.

Friendly: Professor Slotnick, would it ever be proper for the head of the ABA to write a personal letter to the President and say, "In considering candidates for this vacancy, why don't you think of so and so."

Elliot Slotnick: I don't think it would be proper and I'm sure the ABA Committee would never try to do it because it would really alter their institutional role in the process.

Friendly: So they're more of a screening device to look at people after the event.

Slotnick: Right.

Friendly: Do you agree with that Dean Halpern?

Charles Halpern: It seems to me the President of the ABA—who is not part of the screening process—could quite appropriately send in suggestions to the President.

Friendly: Do you agree with that Professor Rosenberg?

Maurice Rosenberg: I guess he could. It's a free country and the First Amendment applies to him, but I think he'd be ill-advised to do it.

Friendly: Why would he be ill-advised?

Rosenberg: It seems to me that there are so many other sources of information and I'm not sure that we have yet quite gotten the process started the way it should be started.

Friendly: How should it be started?

Rosenberg: I think that in this conversation the President is having with the Attorney General and others they would talk about some other things besides who.

Friendly: Like what?

Rosenberg: What sort of person do we want?

Friendly: What kind of person do we want?

Rosenberg: What term is the President in—first or second?

Friendly: He's just begun. This is his first term.

Rosenberg: He's just begun; in 1989 he's in his first term. The appointment of a person of one gender or one racial background or another would reflect upon his political chances.

Friendly: Did you notice that the President did not mention anything about the conversation with the Justice about appointing a black? Did you think that was a purposeful omission by President McKay?

Rosenberg: Well I think that the President was going directly to the who question and not the what. I'd start with a question of what kind of person are we looking for.

I do think that the question of what the Court looks like when the pictures of the nine justices appear is a very important symbolic question.

Friendly: There's no black on the Court once Judge Vision retires. Is that important?

Rosenberg: I think so.

Friendly: Why? One hundred and fifty years after *Dred Scott* we still have to have a black seat?

Rosenberg: I don't say that we have to have a black seat. What we have to do is think of the implications of having a very well qualified—perhaps as well qualified as anybody else who could be found—person who's black sitting on the Court instead of someone else.

* * * *

Wade H. McCree, Jr.: May I interject at this point. I think that we're moving too rapidly in the process. What the President should do if the letter of resignation indicates a date of resignation is go public with the letter. The fact that he has written a letter indicating his intention to take senior status or retired status

January 1st would lock the vacancy in. Some great problems could result from a President getting a letter like this. I submit my retirement effective upon the appointment and qualification of my successor. Now you're in trouble because the Justice then can control that process. If he doesn't like the name that comes up, he can produce mischief.

Friendly: How does he do that?

McCree: Well he can indicate that he had an understanding with the President and that this was not in fulfillment of it. But if the letter said January 1st, I think he goes public with that to lock in the retirement and then he proceeds into the nomination process.

Friendly: All right. Thanks for the advice. I'm going to pull the curtain on this little epilogue just for a moment and I'm going to move along to the fact that the team of Civiletti, Schmults, Rose, Rosenberg have come up with three names. They've talked to all the people, all the bar associations. They've looked at all the letters, they talked to the Chairman of the Judiciary Committee, Senator Smythe...did they talk to the Chief Justice by the way? Is that permissible, Mr. Civiletti?

Civiletti: Permissible, but not necessarily advisable.

Friendly: Why is it not advisable? Who would know better?

Civiletti: Because he doesn't have a role in the appointment process ordinarily, and if you're inviting him in then he will take the opportunity to exercise his judgment.

Friendly: He doesn't have First Amendment rights?

Civiletti: You'll have enough problems dealing with the Chairman of the Senate Judiciary Committee, the majority leader of the House, and other congressional leaders that I don't think you will want to get the Chief Justice involved in the selection process.

Friendly: You're not suggesting that in the last eight or nine appointments to the Supreme Court Chief Justices haven't been consulted and listened to?

Civiletti: Yes, but that's after the selection generally.

Friendly: Is it true Attorney General Schmults that the Chief Justice is not generally consulted until after the appointment?

Schmults: I would say that was right—the ones I'm aware of. I think what is far more likely is the Chief Justice would come and talk to you.

Joiner: I don't think the Chief Justice should go to the President unless he's asked. I think the President has the power and he should initiate all of the inquiries that he thinks are appropriate.

Rosenberg: It seems to me that some preliminary decision might have been made by the President and his close advisors as to who they want to take into consideration. If they want to take into consideration judges of the courts of appeals, for example, then they might want to find out who knows them and the Chief Justice might be a likely source.

Friendly: Is there anything wrong with the Chief Justice going over and saying, "Mr. President, I have watched all these judges. We go to these circuit meetings. I know them better than anybody in the country. I have three names I want to give you and I'd like to see you tomorrow at a time convenient with you or any time in the next week or so." Anything wrong with that Mr. McKay?

McKay: I think it's absolutely proper. If the American Bar Association and the Attorney General and the Senate and everybody around the country is going to advise the President, why not the Chief Justice. That's my view.

Elaine R. Jones: I would really disagree with the notion that as a matter of course the Chief Justice, or any other sitting justice on the Supreme Court, should inform the President as to his or her choices for that Court without having first been asked.

Friendly: Why?

Jones: I think when the Chief Justice and justices of the Supreme Court interject themselves into the nomination process whether it's at the court of appeals level, the district court level, or the Supreme Court level, you have an institutional problem. The President knows well that the Chief Justice is the Chief Justice, and knows the workings and operations of the Court, and if he wants that advice, he knows where to get it.

Friendly: So it's up to the President.

Jones: I think so.

Friendly: All right. Interesting difference of opinion. Curtains down on that.

We've got three names agreed to by our committee. Mr. President, here are three names. The first is a male court of appeals judge from X circuit—been on the circuit for 12 years, written a lot of great opinions, all the right material and everything else—couldn't go wrong with him. We have a black male. He was a state trial judge in criminal courts in a big metropolitan city like Chicago, New York, St. Louis, Los Angeles, was appointed to fill a vacancy to the Senate, and a year and a half later was elected. So he is a Senator, former state judge, on the Judiciary Committee—very well thought of, member of the right political party, and has a judicial mind. He is black. He's a close friend of Judge Vision. Third is a woman—white. Was the dean of a law school in the sun belt and is now a member of the court of appeals.

So we have three people. White female, white male, black male. I want you to be my committee. You're changing roles, now. You're going to be my advisors. I'm the President. I may ask one or two of you to be President before we're through. Who do you vote for Ms. Jones?

Jones: Well the bottom line is that all of these people are qualified. And I assume the court consists of eight white males.

Friendly: It's seven white males, Ms. O'Connor, and a vacancy.

Jones: There's no black on the court and we do have an interest in diversity of judgment. My vote is for the black.

Schmults: I'd like to know which candidate is closest to the President in political and judicial philosophy.

Friendly: How are you gonna find that out? You're going to invite these three people for a meeting?

Schmults: Actually, you would have done a lot of other things before this. You would have read all the decisions.

Friendly: You've done all that and they're all pretty much your kind of person. I'll be the white male. There we are, we're having a drink together at 5:00 in the afternoon. What do you want to know?

Schmults: I would like to discuss with you how you see the role of courts in our governmental system.

Friendly: I see it as it is said in the Constitution. We are a court of appeal, we've decided ever since 1801 (*Marbury v. Madison*) that we will be the referee with the striped shirt, we will make these decisions. I believe in judicial review but I'm not an activist judge. I'm your kind of judge Mr. President, the kind you spoke about when you accepted the nomination. Any other questions?

Schmults: No. It sounds like we know what your judicial philosophy is.

Friendly: What else do you want to know? Anything you want to know about any big cases coming up?

Schmults: No, I wouldn't want to know about any big cases.

Friendly: But you know in the platform they said, "that on gun control and abortion we will appoint no one to the Supreme Court who does not believe as our party believes." Aren't you going to honor your party's commitment to that?

Schmults: No, I think what you do is determine whether the people on your list have the same view of the role of the courts in our system as the President and I do not think you would ask them how they would decide specific cases. That would be demeaning to the candidates and to the President.

Friendly: Well why don't you try a candidate? Why don't you ask Judge Bauer how he feels about abortion laws. That's what the party said. You ran on that platform. Don't you believe in it?

Schmults: I do believe in the platform—that's what I ran on. Presumably that's my platform but I don't have to apply it specifically in this way by asking judicial candidates questions how they would decide specific cases. I think I should determine whether the person I'm going to appoint has my general outlook about the role of the courts, judicial/political philosophy, view of the nation; but as to how you would decide a specific case, I really think that would be inappropriate. I would not ask the candidate that. First of all the facts and circumstances are changed at the time the case comes up.

Friendly: You remember that *Roe v. Wade*

case back in 1972 or 73, if that were tried tomorrow, same set of facts except we know a lot more about medical science now and we can preserve a life from the second week on—wouldn't you ask Judge Bauer/Judge Joiner how they'd feel about that case if it were argued tomorrow?

Schmults: Well I think that is a good point. I think you might well ask them about a case like *Roe v. Wade* that perhaps, in the discussion of that case, would bring out the candidates' view of the courts and the Court's role in applying the law.

Friendly: Why don't you ask Judge Bauer?

Schmults: I'd be interested in your analysis of *Roe v. Wade*. Do you think that the way that case was decided, and the principles that were enunciated was consistent with your views as to what the courts ought to be doing in our system of government?

Bauer: I'm not in the position at the moment, Mr. President, to totally criticize the opinion. On the other hand there have been a lot of changes in facts, additional things that must be brought to the attention of the Court or could be brought to the attention of the Court, and I'd certainly be willing to give it a second look in view of new knowledge.

Schmults: I'm really not asking you about an abortion decision as such.

Bauer: You're asking about *Roe v. Wade*?

Schmults: Yes, I was asking about *Roe v. Wade* but I'm not really asking you about what you think about abortion. Really what I'm trying to get at is your view as to whether the courts ought to pay considerable deference to Congress and the legislatures or should courts be looking for ways to reach out by deciding questions that are very controversial in our society.

Bauer: Mr. President, the courts are frequently forced into deciding controversial questions present in our society because of an absence of action by either the Congress or the executive branch of government.

Schmults: So it's your view that courts should step into vacuums where the likely accountable branches don't act.

Bauer: Mr. President, you and I both know that the Court never steps into a vacuum. The vacuum is brought to them and thrust upon them.

Friendly: Come on, answer the question judge.

Bauer: I've just answered the question. I do not think that courts should seek out solutions for problems that have not been brought to their attention, but I don't think they can avoid problems that are forced upon them.

Friendly: Do you have a better way to answer the question, Mr. Civiletti?

Civiletti: I wouldn't be asking those questions in the first place. I'd be looking for intellectual capacity first and exploring that...and making a very close analysis of the opinions. Beyond capacity, the ability to be creative in the law—to understand and apply the law.

Friendly: But you're using all kinds of fancy words to duck the issue.

Civiletti: No, no, no. Third, I'd want to look for fairness among these three last candidates. I think those three qualities make a great Chief Justice or a great justice, and from my point of view as Attorney General, not as a President who has said I'm not going to have anybody on the Court who's going to decide things contrary to my political philosophy. You can't control a justice anyway once they're on the Court. There's been a lot of disappointments between what the President thought he was getting when he appointed a justice and what he actually got.

* * * *

Friendly: We're back to our three candidates. Who are you going to be for Mr. Slotnick?

Slotnick: I think there was something you said in the hypothetical that made it even more apparent that the black judge makes sense, and that was that he was on the Senate Judiciary Committee and was in the majority. He would just sail through the Senate.

Friendly: Is that a consideration?

Slotnick: Oh, I think it should be for a President.

Friendly: You mean the President of the United States under Article II selects judges and under Section III for life, and he is going to do it on the basis of how quickly they're going to be confirmed.

Slotnick: Not on the basis of that, but

you're saying they're all good.

Friendly: But that's why you're going to do it—because he's on that committee?

Slotnick: I think having the black candidate when you have no black members of the Court combined with the fact that this is an individual who is on the Judiciary Committee in the majority means everything is coming up right for this particular person.

Friendly: He's the perfect candidate politically.

McCree: I think I'd go with the black male. I understand that he is a member of the Senate of the United States and he's on the Judiciary Committee. As President I can only appoint someone by and with the advice and consent of the Senate. And here I have someone coming from the Senate who's going to have an easier path through it. Plus another point. Abner Mikva, who used to sit in the Congress and is now a judge of the Court of Appeals for the District of Columbia, has written recently about the absence of someone on the Court who has knowledge of the legislative process. Much of the Court's business today, most of it, is interpreting statutes. It's not the Constitution, it's not the common law, it's congressional statutes.

Friendly: You want a legislator because that's what the Supreme Court does is legislate?

McCree: No, I didn't say that. What the Supreme Court does is interpret statutes.

Friendly: Which is another way of saying it legislates.

McCree: If you prefer it. But I prefer to say that they interpret statutes. There hasn't been anyone since Hugo Black with any legislative experience. If we talk about the Court as being representative of the country, here you get a black male who is also a legislator.

Friendly: Who are you going to put on the Court, Dean McKay?

McKay: Well if everything is truly equal, I would put the black male on, but you haven't adequately put in one of the factors that I think the President would take into account.

Friendly: What's that?

McKay: Which of the candidates most closely adheres to the views that the President personally espouses for the Court.

Friendly: If you push me to the limit, it's the white male. He is the carbon copy of the President of the United States.

McKay: Then I think the President—and I don't necessarily speak as myself—I think the President would probably choose the white male as the one who would be most reliable.

Friendly: And you're going to not have a black on the Court for the first time since 1963?

McKay: The one who will most likely espouse the views that I think are appropriate for the courts is the one that I would choose.

Friendly: But it's a political decision you're making.

McKay: Of course. It's a political situation.

Friendly: You're willing to admit it. I've heard all the stuff about substance, point of view; you want somebody who agrees with you on *Roe v. Wade*.

McKay: Very closely. Very closely. I don't think we should have a black seat, or a Catholic seat, or a Jewish seat, or a female seat. We might want more than one of each of those at various times.

Friendly: We're going to get the Court up to 50 members.

Bauer: I think that the reason that the country follows what the Supreme Court says, and remember the Supreme Court has no militia, no troops or anything like that, is because we accept the Supreme Court. If we don't appoint that black male to replace the black male, we're going to bring to a large segment of the population an idea, true or false, that they have been disenfranchised somehow, and cheated, and I would not perpetrate that upon the American public. I would, therefore, vote for the black male. But I would tell him why I was doing it.

Schmults: One of the things I'd like to do is know the context. How many more appointments am I going to have?

Friendly: Who knows? How many did President Carter have to the Supreme Court? Zip! How many has President Reagan had? One. So one never knows, does one. Who are you going to vote for?

Schmults: I'm voting for the black male.

* * * *

Friendly: Thank you all very much. □

THE WHITE HOUSE

WASHINGTON

June 24, 1985

MEMORANDUM FOR DANIEL J. ENGLER
STAFF ASSISTANT
OFFICE OF WHITE HOUSE CORRESPONDENCE

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Proposed Letters to Judge Fred Wicker and Judge Samuel Rosenstein

Counsel's Office has reviewed the above-referenced proposed letters to judges, and finds no objection to them from a legal perspective. Thank you for submitting them for our clearance.

ID # _____ CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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Date Correspondence Received (YY/MM/DD) ____/____/____

Name of Correspondent: Dan Engler

☐ MI Mail Report **User Codes:** (A) _____ (B) _____ (C) _____

Subject: Proposed letter to Judge Fred Wicker and Judge Samuel Rubenstein

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
WHolland	ORIGINATOR	85/06/18			/ /
CWAT18	Referral Note: R	85/06/18		S	85/06/19
	Referral Note:	/ /			/ /
	Referral Note:	/ /			/ /
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	Referral Note:				

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

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B - Non-Special Referral
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Type of Response = Initials of Signer
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Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
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5/81

THE WHITE HOUSE
WASHINGTON

June 18, 1985

Memo for: Dianna Holland

From: Dan Engler
Office of Correspondence
x7610, Rm. 96

Re: Dated material for clearance by your office

Here are copies of two Presidential replies to judges, dated June 18, which we would like to send by COB June 20.

We thought we could save your office the trouble of composing a memo of reply if we could just mail the replies by COB Thursday unless your office has any objections.

Thank you,

Dan

Dan Engler

COPY

THE WHITE HOUSE

WASHINGTON

June 18, 1985

Dear Judge Wicker:

Thank you very much for your kind message. I am most grateful for your generous words. They mean a great deal to me, especially in view of your own wartime experience.

It seems to me we achieved something most unusual forty years ago. Back through history, wars were settled in such a way they planted the seeds for the next war. The hatreds and rivalries remained. Not this time. Here it is four decades later and our erstwhile enemies are our staunchest friends and allies.

Again, my thanks to you and very best wishes.

Sincerely,

The Honorable Fred Wicker
Circuit Judge
Circuit Court
Pontotoc, Mississippi 38863

304758

FRED WICKER
CIRCUIT JUDGE
PONTOTOC, MISSISSIPPI 38863

37

LAD

CIRCUIT COURT
FIRST DISTRICT OF MISSISSIPPI

COUNTIES:
ALCORN
ITAWAMBA
LEE
MONROE
PONTOTOC
PRENTISS
TISHOMINGO

May 17, 1985

Honorable Ronald Reagan
President of the United States
The White House
Washington, D. C. 20515

COPY

Dear Mr. President:

Having made your visit to the cemetery at Bitburg Germany, you are probably interested in how the general public feels about the matter.

As one who was barely 20 years old when I landed in Normandy and returned to New York City on December 25, 1945, my personal feelings are that it was a very fine act on your part and one that needed to be done. When a nation has been defeated, why should the victor not be magnanimous? What reasonable product of Judeo-Christian Civilization could possibly find fault with the placing of a wreath in a cemetery filled with the war dead of the erstwhile foe. This would be particularly true as to West Germany, now our staunchest ally.

I have not been out of Mississippi since the news media started the furor but have been in several areas of this state. This brought me into contact with a fair cross section of the population and, frankly, the subject was never mentioned until I brought it up out of curiosity about the general attitude and reaction. Invariably the attitude of the others present was the same as mine.

Yours was a noble gesture and when the voices of the small souled critics have died away you will be vindicated in the minds of people of good will everywhere and hailed for it when the history of this time is finally written.

When the Senate and House of Representatives, frightened and excited by the press, were requesting that you change your plans, I was fearful that you would do so. I realize now that I was doing you a disservice in harboring such doubts. "What went ye out into the wilderness for to see? A reed shaken in the wind?" Matthew 11:7

Congratulations for doing the right thing.

Sincerely,

Fred Wicker

COPY

THE WHITE HOUSE

WASHINGTON

June 18, 1985

Dear Judge Rosenstein:

Please accept my heartfelt thanks for your message of May 7. I appreciate more than I can say your kind and generous words.

My purpose was never to suggest we forgive and forget, and I found that today's Germans do not suggest such a thing. They have preserved the camps with evidence of all the horror of the Holocaust, and they say along with us, "Never again."

You were kind to write as you did and your message means a great deal to me.

Sincerely,

The Honorable Samuel M. Rosenstein
Senior Judge
United States Court
of International Trade
Suite 403, Federal Building
299 East Broward Boulevard
Fort Lauderdale, Florida 33301

#C04295

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UNITED STATES COURT OF INTERNATIONAL TRADE

FEDERAL BUILDING—U.S. COURTHOUSE
SUITE 403
299 EAST BROWARD BLVD.
FORT LAUDERDALE, FLORIDA 33301

CHAMBERS OF
SAMUEL M. ROSENSTEIN
SENIOR JUDGE

Personal - Not Official

May 7, 1985

Honorable Ronald Reagan
President of the United States
The White House
Washington, D.C.

COPY

Dear Mr. President:

I strongly feel that the continued criticism of your May 5 visit to the Bitburg cemetery is unfair and unjust.

From what I have read and heard, when the invitation was extended you had no way of knowing who was buried in that cemetery and what it symbolized.

As a man of integrity you felt that having accepted the invitation, the good relationship you had established with Germany would be adversely affected if you cancelled the appointment.

I have no doubt that had you been advised of the entire situation in advance, you unquestionably would not have accepted the invitation. You did all that you reasonably could under the circumstances and your address at the airport was a masterpiece.

As usual, Mrs. Reagan proved herself to be a most worthy helpmate both in Germany and Italy. Both of you continue to enjoy the respect, confidence, and admiration of thinking, fair-minded people.

Definitely, if you are able to accomplish a reconciliation with Russia and retain the support of Germany, you will have given a legacy to future generations of Americans which they have never before had.

With expressions of my respect and high regard for your and Mrs. Reagan

Cordially,

Samuel M. Rosenstein

Samuel M. Rosenstein
Senior Judge

SMR/ll